Before the
FEDERAL COMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment	)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of	)	
Broadband Deployment by Improving Policies	)	
Regarding Public Rights of Way and Wireless	)	
Facilities Siting	)	

COMMENTS OF THE
LEAGUE OF MINNESOTA CITIES,
SUBURBAN RATE AUTHORITY, AND
MINNESOTA ASSOCIATION OF CABLE
AND TELECOMMUNICATIONS ADMINISTRATORS

The League of Minnesota Cities ("LMC"), the Suburban Rate Authority ("SRA"), and the Minnesota Association of Community Telecommunications Administrators ("MACTA") jointly file these comments in response to the Notice of Inquiry ("NOI") in the above-entitled proceeding.[1]

The LMC is a statewide cooperative association representing 830 cities, 11 townships and 51 special districts. Only 24 cities in Minnesota are not LMC members (each of which has a population of less than 120). The LMC was established in 1913 within the school of public affairs at the University of Minnesota. It became an independent association representing and serving cities in 1974. The LMC governed by a board of directors elected by its membership.

The SRA is a joint powers association organized under Minnesota Statutes, Section 471.59 and comprised of 27 Minneapolis-St. Paul suburban municipalities totaling over

[1] *In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting,* FCC 11-51, WC Docket No. 11-59, Notice of Inquiry (April 7, 2011).

800,000 in population (membership list attached). The SRA was formed to address gas, electric, and telecommunications matters affecting suburban municipalities and their residential and business ratepayers.

MACTA is a Minnesota non-profit association consisting of 42 member cities, cable commissions, community cable TV facilities, and advisors representing 98 cities or community organizations. MACTA was formed in 1982 as a trade association supporting its member cities by providing educational, networking, and legislative/regulatory assistance in areas relating to cable television and telecommunications.

INTRODUCTION

The LMC, SRA, and MACTA support the comments of the National League of Cities, National Association of Telecommunications Officers and Advisors, the American Public Work Association, the Government Finance Officers Association, the National Association of Counties, the U.S. Conference of Mayors, and the International Municipal Lawyers Association filed in response to the NOI. Such comments reflect our interests from a national perspective. We specifically endorse the comments by these national organizations regarding the limits of the Commission's jurisdiction, industry trends, and national broadband deployment facts.

The NOI asks more than one hundred questions related to local right-of-way ("ROW") management and facility placement processes. The NOI seeks information about whether the Commission should take additional actions in this area. The NOI questions relate to several distinct topics, including: 1) whether application procedures, forms, substantive requirements and charges are readily available; 2) the timelines for

action and potential sources of delay, and; 3) data "on current permitting charges, including all recurring and non-recurring charges, as well as any application, administrative, or processing fees."

These comments respond to the main NOI topic areas by explaining ROW and facility management practices in Minnesota and describing how such practices effectively provide access to communications providers while protecting the health, safety and welfare of the public. The regulatory framework for use of city, town and county ROWs in Minnesota is principally governed by Minnesota Statutes, Section 237.162 and 237.163 and Minnesota Public Utilities Commission ("MPUC") Rules. These statutes and rules draw from the long history in the U.S. and Minnesota regarding the common law of city police power.

The Local ROW Act and ROW Rules are the result of a two year process of negotiation and compromise among numerous experienced governmental and industry representatives. The resulting framework is comprehensive and has been effective for the twelve plus years since enactment. The LMC, SRA, and MACTA are unaware of serious industry or local government objections to Minnesota's ROW management framework.

We urge the Commission to refrain from interfering with Minnesota state law and the local ordinances and practices implementing such law. Imposing a new federal regulatory overlay would create unnecessary costs of compliance for our communities, may undermine important local policies, and would create regulatory uncertainty and confusion. If the Commission feels compelled to act, it should establish voluntary educational programs, and implement its own recommendations in the National Broadband Plan for working cooperatively with state and local governments.

1. MINNESOTA LAW

The main topic areas raised by the NOI can largely be addressed by describing the relevant legal framework in Minnesota. Although we note federal statutes or regulations where they intersect with Minnesota law, other parties will focus more thoroughly on the overarching federal framework relevant to the NOI.

A. Local ROW Management

In 1997, the Minnesota state legislature addressed the advent of a competitive telecommunications market ushered in by the Federal Telecommunications Act of 1996 and other state developments. The legislature implemented a comprehensive statutory framework, codified as Minn. Stat. §§ 237.162 and 237.163 ("Local ROW Act" or "Act"), authorizing local units of government ("LGUs") to manage ROW use by telecommunications providers. The Local ROW Act largely restated rights that existed in the common law and other specific statutory provisions.

Under the Act, a "telecommunications right-of-way user" may "construct, maintain and operate conduit, cable, switches and related appurtenances and facilities along, across, upon, above, and under any public right-of-way."[2] Telecommunication facility access to the ROW is subject to the LGU's "authority to manage its public rights-of-way ...."[3] Management includes requiring a permit and payment of permit application fees, establishing and defining facilities location and relocation requirements, and construction coordination and timing requirements.[4]

[2] Minn. Stat. § 237.163, subd. 2(a).
[3] Minn. Stat. § 237.163, subd. 2(b).
[4] Minn. Stat. § 237.163, subd. 8(4)(5).

The ROW Act also delegated to the MPUC authority to establish statewide construction standards to achieve uniformity in the terms and conditions under which facilities are placed in the ROW.[5] In 1999, the MPUC promulgated the ROW Rules codified at Minn. Rules, Part 7819.0050 *et seq.* ("ROW Rules"). Because the Local ROW Act provides that "the rights, duties and obligations regarding use of the public right-of-way imposed under this section must be applied to all users of the public right-of-way ....", the ROW Rules are applicable to all utilities and not just telecommunications providers.[6]

In order for an LGU to manage local ROW under the Local ROW Act, it must adopt an ordinance consistent with the Act and the PUC rules.[7] LGUs may not adopt ordinances or other regulations that conflict with uniform state standards.[8]

B. Summary of Specific Application of Statutes, Rules and Ordinances to Utility ROW Use.

The following points summarize how the main topics raised in the NOI have been addressed in Minnesota:

- The LMC, in cooperation with the SRA and City Engineers Association of Minnesota, has produced a model ROW management ordinance. www.lmc.org/media/document/1/modelrowordinance.pdf

  The model ordinance was developed concurrently with the ROW Rules promulgation in 1999. The model was developed with input from ROW users including utilities, phone companies and cable providers. The model has been updated several times since its original drafting. The modifications reflect the results of continuing dialogue between municipal and industry representatives along with input from cities that have adopted modified versions to meet the

[5] Minn. Stat. § 237.163, subd. 8.
[6] Minn. Stat. § 237.163, subd. 6(c).
[7] Minn. Stat. § 237.163, subd. 2(b) and Minn. R. 7819.0050. Local ROW management authority extends to all ROW in which the local government has an "interest." Minn. Stat. § 237.162 subd. 3. Cities share ROW management authority with counties in county roads and county state aid highways. The state has ROW management authority over trunk highways and interstate freeways. Minn. Stat. §§ 161.45, 161.46.

[8] Minn. Stat. § 237.163, subd. 8(c).

unique needs and circumstances of their individual communities. Moreover, the model is available in both a long and short version to offer different degrees of ROW management depending on the size, demographics, rate of development, etc. of various communities.

The model details permit application procedures, substantive ROW usage requirements, and the basis for associated charges. The purpose of the model ordinance is to promote uniformity among Minnesota's cities and towns regarding ROW management while accommodating adoption of local policies or practices. The model ordinance notes areas where unique local processes or practices should be considered and potentially incorporated into the ordinance.

Nearly all of the SRA's member cities have enacted ordinances that are consistent with the model. Although the LMC has not conducted a detailed study of its 850+ members, it is believed that a significant number of the LMC's member municipalities have also done so.

- Under the Local ROW Act, ROW permit fees and other management fees must be:
    1. based on the actual costs incurred by the LGU in managing the ROW;
    2. based on a proportionate allocation of the costs imposed on the LGU by all users of the ROW, including the LGU itself;
    3. imposed on a competitively neutral basis; and
    4. imposed so that above ground uses of ROW do not bear costs incurred by the LGU to regulate underground users.[9]

  ROW management fees may include the cost of inspecting job sites, moving facilities during ROW work, restoring work inadequately performed or revoking permits. However, such costs "do not include payment by a telecommunications right-of-way user for the use of the public right-of-way."

- LGUs are prohibited from unreasonably denying or revoking permits. A permit may only be denied or revoked if "necessary to protect the health, safety and welfare," to protect the ROW, or if the ROW user violates an applicable law or condition of the permit such as a failure to complete work or correct improper work in a timely manner.[10]

- In the event an LGU denies or revokes a ROW permit, or imposes fees the ROW user believes are excessive, the ROW user may have the decision reviewed at the "next regularly scheduled meeting" of the LGU's governing body. If affirmed, the decision must be "in writing and supported by written findings establishing the reasonableness of the decision."[11]

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[9] Minn. Stat. § 237.163, subd. 6.

[10] Minn. Stat. § 237.163, subd. 4.

[11] Minn. Stat. § 237.163, subd. 5.

- The MPUC is authorized to review any a decision or regulation by a LGU that is alleged to violate a statewide standard under the ROW Rules.[12] The LMC, SRA, and MACTA are unaware of any significant disputes that have been brought before the MPUC under this authority in the 12 years since the ROW Rules were promulgated.

- If a ROW user enters a franchise agreement with a city (allowed for cable, gas and electric utilities), such franchise terms "shall prevail over any conflicting provision in an ordinance."[13]

C. Wireless Siting--- Zoning Decisions

Minnesota law imposes strict timelines on local zoning decisions, providing in relevant part:

> ... an agency must approve or deny within 60 days a written request relating to zoning... for a permit, license, or other governmental approval of an action. Failure of an agency to deny a request within 60 days is approval of the request. If an agency denies the request, it must state in writing the reasons for the denial at the time that it denies the request.[14]

By law, an LGU can extend the 60 day review to 120 days upon written notice to the zoning applicant but any further extension must be with the applicant's consent.[15] State law mandates that the written reasons for a denial must provided to the applicant upon adoption.[16]

The Commission's recent "shot clock" order regarding wireless siting was intended to implement applicable federal law:

> A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities *within a reasonable period of time* after the request is duly filed with such government or instrumentality, *taking into account the nature and scope of such request.*[17]

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[12] Minn. Stat. § 237.163, subd. 8(b).
[13] Minn. Stat. § 237.163, subd. 6c.
[14] Minn. Stat. § 15.99, subd. 2(a).
[15] Minn. Stat. § 15.99, subd. 3(f).
[16] Minn. Stat. § 15.99, subd. 2(c).
[17] 47 U.S.C. § 332(c)(7)(B)(ii) (emphasis added).

The "shot clock" order provides for action on collocation requests within 90 days, and 150 days for all other applications.

Minnesota's requirements typically result in final action on wireless siting requests in less time than is required by the "shot clock" order. Moreover, should an LGU fail to timely act under Minnesota law, the consequence is "approval of the request" by operation of law. Thus, Minnesota law is more restrictive than the "shot clock" order.

Cell tower and antenna siting decisions by Minnesota cities have sought to comply with both state zoning and land use laws and the 1996 Telecommunications Act. Minnesota has had far fewer cases commenced under the Telecommunications Act, or appealed to the Eighth Circuit than many other states.

D. Cable Communications

Minnesota law, codified as Minn. Stat. § 238.01 *et seq.* (the "Minnesota Cable Act"), comprehensively addresses cable franchising. The Minnesota Cable Act specifies a public process for considering and issuing cable franchises.[18] The Minnesota Cable Act also sets forth certain provisions that must be contained in a cable franchise.[19]

The Minnesota Cable Act requires that all cable franchises be non-exclusive.[20] In addition, the law specifically addresses franchising of a competitive cable provider where cable service is already provided.[21] The Act requires a "level playing field" between cable incumbents and competitors, providing:

> No municipality shall grant an additional franchise for cable service for an area included in an existing franchise on terms and conditions more favorable or less burdensome than those in the existing franchise pertaining to: (1) the area

[18] Minn. Stat. § 238.081.
[19] Minn. Stat. § 238.084.
[20] Minn. Stat. § 238.084, Subd. 1(d).
[21] Minn. Stat. § 238.08, Subd. 1(b).

served; (2) public, educational, or governmental access requirements; or (3) franchise fees.[22]

The Minnesota Cable Act was amended in 2004. These amendments were intended to update the law and eliminate any perceived inconsistencies with federal cable laws and Commission regulations. The amendments were supported by the LMC and MACTA as well as the Minnesota Cable Communications Association, the trade association for Minnesota's cable industry.

In 2010, the Minnesota Cable Act was amended again to further accommodate competitive entry. These amendments clarified the "level playing field" requirement by confirming that telephone companies may be franchised to provide cable service in only that portion of a municipality where the company offers local exchange telephone service.[23] Thus, municipalities are not required to mandate that a telephone company offering competitive cable service build-out in precisely the same area as the incumbent cable provider.

The Minnesota Cable Act is consistent with the Commission's recent actions to address competitive cable franchising including the Commission's competitive franchising order released March 5, 2007. That Order addresses application fees, franchise fees, and PEG and I-Net support obligations payable by competitors, the imposition of unreasonable build-out requirements on competitors, and the timeline for processing a competitive franchise application. Minnesota's comprehensive state cable franchising regime addresses all of these issues and, as with the "shot clock" order, the Commission's action simply created some degree of confusion.

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[22] Minn. Stat. § 238.08, Subd. 1(b).
[23] Minn. Stat. § 238.08, Subd. 1(c).

RESPONSES TO SELECTED NOI QUESTIONS

1. Should the Commission adopt guidelines or rules allowing or requiring infrastructure providers to impose separate line item fees to recover ROW or wireless facilities siting charges directly from subscribers in the jurisdiction imposing such charges in order to increase transparency and accountability and minimize cross-subsidies?

Answer - In Minnesota, telephone companies are afforded access to local and state ROW without tax, franchise fee or ROW rental, subject only to ROW management fees. By law, ROW management fees reflect actual city employee labor and equipment costs to maintain ROW use for the public. These fees reimburse LGUs for the burdens associated with providing ready access to the local ROW. The availability of ROW relieves telecommunications providers of the expense and burden of having to acquire easements to place facilities.

The LMC, SRA and MACTA strongly object to any line item "pass-through" charge to customers based on city ROW management fees imposed to recover the city cost of regulatory telecommunication carrier use of city ROW. Such costs are, and always has been, a cost of doing business to the carriers. They are distinct from taxes imposed by cities, if granted such authority by the legislature.

Notwithstanding, any line item pass-through of ROW management fees would be seen by the public as a tax and would put unwarranted pressure on municipalities' ROW management and cost recovery efforts. These ROW management costs are no different than land and facility costs from private landlords incurred throughout the service area which do not appear as line items on bills. These actual management costs to regulate ROW should not be distinguished from other business costs as line item pass-throughs on customer bills.

2. Comment on the extent to which ROW and wireless facilities siting concerns are likely to increase or decrease in the near future. For example in other contexts, it appears that many long-term ROW contracts will expire in the next few years. Is this likely to cause a spike in rights of way disputes?

Answer- In Minnesota, gas, electric and cable franchises are the only long-term ROW contracts. They generally run 20 to 25 years. Utility franchises have been successfully renewed in Minnesota for more than 100 years. Cable franchises have been successfully renewed across the country since the advent and growth of the industry in the 60s and 70s.

The Local ROW Act and ROW Rules have largely eliminated the need for detailed ROW management provisions in Minnesota utility and cable franchises. The state regulations serve as a baseline, with parties to franchise negotiations typically using the franchise to modify Rules on a community-specific basis. Such negotiations show no signs of breaking down. Wireless site leases and lease payments are similarly negotiated and renewed substantially without litigation. The LMC, SRA and MACTA expects that to continue.

3. Do existing ordinances or other requirements successfully address the placement of small antennas on existing facilities in ROW? In particular, comment on any challenges that may apply to the deployment of microcells, picocells, femtocells, and Distributed Antenna Systems (DAS).

Answer- To the extent placement of antennas on existing facilities in ROW will include work on or in the ROW itself, or will interfere with use of the ROW (for vehicular or pedestrian movement or use by other utilities), the model ROW ordinance would require a permit. As noted above, the ROW Rules and model ordinance explicitly address the process for obtaining a permit, rules governing the work, and associated fees.

To the extent the existing facilities are municipally-owned (for example, city utility poles), a lease, license, pole attachment agreement, or other contractual arrangement will likely be required. Although municipal poles are not subject to the Commission's pole attachment regulations, we are unaware of any significant disputes in Minnesota regarding the terms and conditions for accessing municipal utility poles or other facilities located in ROWs.

SRA members and other Twin City Metropolitan area cities gained experience with a similar technology in the late 90s when Metricom initiated construction of a network deploying small antennas in the ROW. Metricom ultimately attempted to abandon or did abandon their equipment. Some cities were left with the responsibility and cost of removal and clean up.

The placement of such antennas in ROW may trigger zoning review depending on the particular, applicable local zoning requirements. As detailed above, Minnesota's zoning review process is comprehensive and typically faster and more protective of the applicant's interests than the "shot clock" order.

4. Are zoning requirements for wireless facilities siting nondiscriminatory?

Answer- Yes, as a matter of law.

> A zoning ordinance must operate uniformly on those similarly situated. . . . [T]he equal protection clauses of the Minnesota Constitution and of the Fourteenth Amendment of the United States Constitution require that one applicant not be preferred over another for reasons unexpressed or unrelated to the health, welfare, or safety of the community or any other particular and permissible standards or conditions imposed by the relevant zoning ordinances.

Northwestern College v. City of Arden Hills, 281 N.W.2d 865, 869 (Minn. 1979). The LMC, SRA and MACTA are not aware of complaints by wireless providers in Minnesota

that the application of zoning laws to the wireless industry as a whole or to particular companies, has been discriminatory.

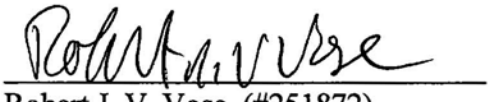
CONCLUSION

The LMC, SRA and MACTA do not believe that Minnesota Statutes, rules or local ordinances have discouraged or created barriers to broadband deployment. Minnesota cities *welcome and desire* broadband deployment, and our policies allow us to work with any company willing to provide service. We believe our policies have helped to *avoid* problems and delays in broadband deployment.

We urge the Commission to conclude that ROW and facility management and charges are not impeding broadband deployment. There are concrete reasons to believe that additional federal regulations would prove costly and disruptive to our communities. There is simply no need for such additional regulation.

Respectfully submitted,

KENNEDY & GRAVEN, CHARTERED

By: 

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2011 SUBURBAN RATE AUTHORITY MEMBER CITIES

Bloomington	Maple Plain
Brooklyn Park	Maplewood
Chanhassen	Minnetonka
Circle Pines	Mound
Deephaven	Orono
Eden Prairie	Plymouth
Edina	Robbinsdale
Fridley	Roseville
Golden Valley	Shakopee
Hastings	Shoreview
Hopkins	Spring Lake Park
Lauderdale	Spring Park
Maple Grove	Wayzata
	Woodbury